

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN RE: D. P.

K. P and B. P.,
Petitioners,

NO.: 02-48

vs.

CROCKETT COUNTY SCHOOL SYSTEM
Respondent.

FINAL ORDER

This case came before the Tennessee Department of Education, on November 8, 2002, upon a Petition, filed by K. P. and B. P., the parents of D. P., an 8 year old child, who has the diagnosis of "autism", as defined by the *Tennessee Rules, Regulations and Minimum Standards and the Administrative Policies and Procedures Manual of the Division of Special Education of the State Board of Education* ("APPM"), Rule 0520-1-9-01(15)(c). The Petition was heard upon the assertions that the School System violated the family and child's procedural due process rights, failed to provide D.P. a free appropriate public education and that placement was inappropriate. They requested compensatory education for the 2001-2002 and 2002-2003 school year at the King's Daughter School in Columbia, TN and until the School System develops an appropriate program in the Crockett County, TN School System.

Petitioners filed the due process hearing request with the School System by letter dated September 12, 2002. A Pre-hearing Conference was held by teleconference and the parties waived the 45 day timeline. The hearing was conducted at the Crockett County Board of Education, Alamo, TN., by Barbara A. Deere, Administrative Law Judge. Petitioners were

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represented by Marcella Fletcher and the School System was represented by Robert Wheeler. In addition to Petitioner B.P., the child's mother, testimony was given by: Sara Moore, Crockett Co, TN Coordinator of Special Education; Kristina Kail, Friendship Elementary Special Education teacher; David Neff, The King's Daughter's School, Director of Residential Services; Mary Marvin, Friendship Elementary Principal; Ashley Jones, Crockett Co., TN speech therapist; Linda Vandermeer, TN Department of Education; and Debbie Patterson, D.P.'s teacher's aide at Friendship Elementary.

FINDINGS OF THE COURT

D.P. is an eight year old student (DOB 9/8/94) presently attending the first grade at Friendship Elementary School in Crockett County, TN. He has received the diagnosis of "autism" by the School System. His initial school experience occurred in Gibson County, TN at the age of four, for two half days per week. He was enrolled in Crockett County School System at the age of four years eleven months, beginning in the Alamo, TN preschool program. He stayed there approximately one and a half years, according to his mother's testimony. D.P. was then "split part time" between Alamo and Friendship Elementary "to transition" him to Friendship. At Friendship, D.P. was placed in the regular kindergarten class with a teacher's aide.

During his enrollment with Crockett County School System, from August, 1999, D.P.'s IEP team met and developed IEP's on nine separate occasions: 8/4/99; 10/1/99; 1/19/00; 5/24/00; 1/12/01; 5/15/01; 5/17/02; 6/20/02 and 9/12/02. The School System scheduled a meeting during May, 2002, and the parents were notified and chose not to attend. Additionally, the parents requested and were provided a meeting on 8/29/02. During D.P.'s first school year three IEP's were written and implemented; during his second school year three were written and implemented and during his third year two were written and implemented. Additionally, two IEP meetings

were held in the fall of 2002, and one IEP was written and implemented. During all of these meetings, with the exception of May 17, 2002, and September 12, 2002, both parents agreed with the IEP goals.

The parents were invited to the May 17, 2002 IEP meeting but declined participation. Attendance for the August 8, 2001 through May 24, 2002 school year consisted of one hundred eighty-one (181) days. Of that number of days the child was absent one hundred two and one-half (102.5) and was present for seventy-eight and one-half (78.5) days. Of those days absent, thirty-eight (38) were unexcused. The child became ill around December 2, 2001, was hospitalized at Lakeside Hospital, then at Timber Springs Hospital. Both hospitals are behavioral health facilities, and the record reflects that the child's medications needed adjustment. Subsequent Timber Springs hospitalizations occurred during March, 2002 and May, 2002 with the final discharge dated June 20, 2002. That discharge report included an IEP which indicated that the child was to return to his home school. The parents signed the June 20, 2002, IEP notes, the Individual Education Program (IEP) in agreement and the father signed, on that date, a Parental Waiver. That Parental Waiver stated that the father waived his right to a ten day written noticed sent via certified mail.

The record reflects, on the "Index of Documents regarding D.P.", twelve different evaluations performed during three years. These included the Kiwanis Center for Child Development, Vanderbilt University Medical Center, Judevine Center for Autism (St. Louis, Missouri), West Tennessee Cerebral Palsy Center, and the Star Center. The documents presented at trial reflect the parents' search for a definitive diagnosis; all evaluations and medical reports state the same thing-this child has autism.

Testimony by the mother included the child's difficult behavior and her mistrust for

Friendship Elementary School. D.P. was initially enrolled in school in Gibson County, Tennessee because the family had problems at Friendship Elementary School, causing them to place their older child in the Gibson County School System. When the child entered kindergarten he went to school in Alamo, Tennessee. The parents were pleased with that school. Problems began to occur during the first grade at Friendship Elementary School. The parent testified that the child was placed in a closet with an aide and that this caused his problems.

The parent testified that the child had problems with medication adjustment. During December 2001, the child received medication that the mother described as "he got one dose of it and went wild". This caused the child's initial hospitalization at Lakeside and Timber Springs. In addition, the child entered Timber Springs in March 2002 and May 2002 because of his medication.

The mother's testimony revealed mistrust of the teacher, teacher's aide, speech therapist, and occupational therapist who were instructing the child. This mistrust along with the allegations that the child was placed in a closet with an aide were the reasons the parents did not return the child to school between the hospitalizations. The staff at Timber Springs showed concern that the child was not being sent to school and convened an MT meeting during June 2002 for the purpose of getting the child reestablished in school.

The first problem noticed by the Administrative Law Judge concerning due process violations would have occurred during the summer of 2002-2003 school year. The mother's testimony was that she and the father considered residential placement during the summer of 2002. They unilaterally decided that the child should be placed at the King's Daughters' School in Columbia, Tennessee. They did not request an IEP team meeting but contacted the school's Coordinator of Special Education "about possibly letting D.P. go there". The parents received no

response from the school during the summer. Somewhere during the summer months, a misunderstanding occurred between the parents and the school system regarding fees for D.P. to attend King's Daughters' School. The school system investigated the fees and agreed to partial payment of those fees. When the parents found out their share of the fees, they attempted to re-enroll D.P. in Friendship Elementary School for the 2002-2003 school year.

When the parents brought the child to school on the first day, they were told they would have to bring him back the next day because the school system was not aware that he would be attending school there and were unprepared to accept him that day. Subsequently a meeting was held to develop the IEP for the school year. This IEP is the first mentioned of residential placement for D.P. and is the first one in which the parents disagreed with the Team's recommendations. On that same date, the parents through their attorney, filed a request for a due process hearing alleging that the school failed to provide a free appropriate public education and failed to inform the parents of their legal rights.

David Neff, Director of Residential Services for the King's Daughters' School testified on behalf of the child. His testimony was primarily about the residential program. He could not offer any direct testimony about the academic program, and the capacity of the school to provide the child in the least restrictive environment.

Testimony of all remaining witnesses reflected that the child is doing well in school, has made past developmental improvement on all IEP's, with the exception of 2001-2002 school year. The school's position was that the child is receiving an educational benefit in the least restrictive environment, and that his placement should remain at Friendship Elementary School. The testimony of Kristina Kail, Mary Marvin, Ashley Jones, and Debbie Patterson, direct school staff working with D.P., was that he has made great improvement since beginning school in August

2002, just over a two-month period. The child has a teacher and an aide. In addition, D.P. receives speech therapy and occupational therapy on a regular basis. The class is located next door to the principal's office. The entire staff appeared to be enthusiastic about teaching the child and were excited with his achievement. The school has obtained special training for the staff and the staff has shared the training with each other. It appears that one picks up where the other leaves off with D.P. The child was initially being taught in an isolated area, but not a closet.

Achievements during the two months of school include taking his lunch tray into the cafeteria and emptying it in the trash can; independently doing a puzzle; using a visual schedule; completing tasks; toilet training; feeding; controlling his behavior; finger-painting; making eye contact; and speaking. The testimony was backed up by pictures showing the child performing some of these activities. The child appeared to be involved and happy in the pictures. In one picture he has his arm around the teacher.

The last witness, Linda Vandermeer, Tennessee Department of Education, autism consultant for the State of Tennessee, behavior consultant for Middle Tennessee, and the director of programs and services, observed the child in the school setting on two different days during the 2002-2003 school year. On the first observation, she found D.P. working in a smaller room with an assistant. She observed teaching occurring. She discussed the importance of autistic children being educating with non-disabled peers. On her second visit Ms. Vandermeer observed the child working out in the resource room among other children. She observed the child performing activities, being reinforced, and smiling. Her words were "he looked happy".

Ms. Vandermeer was sought out by the parents and the school personnel for guidance. She made suggestions which the school implemented. Ms. Vandermeer's professional opinion was that D.P. "Is in a less restrictive environment right now because he is with children who can

communicate and interact with him. I think King's Daughter is a wonderful place, but for a child with autism right now they don't have a – very good program set up in my professional opinion". As to her opinion of Friendship School, she testified that the school has come a long way and that the child is really learning. Other testimony of Ms. Vandermeer that impressed the Administrative Law Judge concerned the child's absence during the previous school year. It was her opinion that the absences played a part in his not making progress. The Court considered this witness an expert in the field of special education, with an emphasis on autism and related services.

CONCLUSIONS OF LAW

The written definition of least restrictive environment, found at *Tennessee Rules, Regulations and Minimum Standards and the Administrative Policies and Procedures Manual* of the Division of Special Education of the State Board of Education, Rule 0520-1-9-01, is:

- (a) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children without disabilities; and
- (b) Special classes, separate schooling or other removal of children with disabilities from the general education environment occurs only if the nature or severity of the disability is such that education in general education cannot be achieved satisfactorily.

Tennessee law also requires local school systems to provide children with "special education services sufficient to meet the needs and maximize the capabilities of handicapped children." TCA § 49-10-101(a)(1) (1972).

In making such a determination, the test for the court is whether the "the individualized educational program developed through the IEP team is reasonably calculated to enable the child to receive educational benefits." *Board of Educ. v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 3050-51, 73 L. Ed.2d 590, 712 (1982). According to *Rowley*, in order to satisfy its duty to provide a free appropriate education, "a state must provide personal instruction with sufficient

support services to permit the child to benefit educationally from the instruction." *Id.* at 203, 102 S. Ct. at 3049, 73 L. Ed.2d at 710. The educational benefits do not have to maximize a child's potential, but must only offer a "basic floor of opportunity" which will allow the child to progress with his education. *Id.* at 201, 102 S. Ct. at 3048, 73 L. Ed.2d at 708.

OPINION

This Court finds that the Petitioners failed to prove D.P.'s lack of progress during the 2001-2002 school year or that any lack of progress was a result of the school system's failure to provide a free appropriate education for D.P. The proof was that D. P. did not attend school for over fifty per cent of the school year. The evidence was that part of the absences were due to illnesses, not a result of any wrong doing by any party. Other absences were at the parents' choice. They did not seek due process until September, 2002, after the school year had passed. The proof after the due process request was that the child was, in fact, receiving an educational benefit in the least restrictive environment. The parents were attempting to place their child in a more restrictive environment. The school system has no choice to so place a child in a more restrictive environment; to do so would violate the *Individuals with Disabilities Education Act*.

The Court further finds that the Petitioners failed to prove a due process violation where there was no disagreement until the summer of 2002. Upon complaining, the Petitioners were provided a due process hearing.

This case is therefore dismissed against the Petitioners.

ENTERED April 28, 2003.

BARBARA A. DEERE
Administrative Law Judge
State of Tennessee, Department of Education

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of § 49-10-601 of the Tennessee Code Annotated.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and exact copy of this Opinion upon Ms. Marcella Fletcher, Attorney for Petitioners, via U.S. Mail postage prepaid at P. O. Box 12255, Jackson, TN 38308 and upon Mr. Robert G. Wheeler, Attorney for Crockett County School System via U. S. Mail postage prepaid at P.O. Box 198615, Nashville, TN 37219 this the 28th of April, 2003.

Barbara A. Deere